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JOHN F. DAVIS

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1965.

**No. 161**

DORA SUROWITZ, Individually and on behalf of all other  
similarly situated shareholders of HILTON HOTELS  
CORPORATION,

*vs.*

*Petitioner,*

HILTON HOTELS CORPORATION, a corporation, CON-  
RAD N. HILTON, ROBERT P. WILLIFORD, ROBERT  
J. CAVERLY, JOSEPH P. BINNS, SPEARL ELLI-  
SON, HENRY CROWN, HORACE C. FLANIGAN,  
BENNO M. BECHOLD, Y. FRANK FREEMAN, WIL-  
LARD W. KEITH, LAWRENCE STERN, SAM D.  
YOUNG, FRITZ B. BURNS, VERNON HERNDON,  
HERBERT C. BLUNCK, CHARLES L. FLETCHER,  
ROBERT A. GROVES, JOSEPH A. HARPER, BAR-  
RON HILTON and HILTON CREDIT CORPORATION,  
a corporation,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT.

**BRIEF FOR PETITIONER.**

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DORA SUROWITZ, Individually and on behalf of all other similarly situated shareholders of HILTON HOTELS CORPORATION,

*Peti. ner.*

*vs.*

HILTON HOTELS CORPORATION, a corporation, CONRAD N. HILTON, ROBERT P. WILLIFORD, ROBERT J. CAVERLY, JOSEPH P. BINNS, SPEARL ELLISON, HENRY CROWN, HORACE C. FLANIGAN, BENNO M. BECHOLD, Y. FRANK FREEMAN, WILFARD W. KEITH, LAWRENCE STERN, SAM D. YOUNG, FRITZ B. BURNS, VERNON HERNDON, HERBERT C. BLUNCK, CHARLES L. FLETCHER, ROBERT A. GROVES, JOSEPH A. HARPER, BARON HILTON and HILTON CREDIT CORPORATION, a corporation,

*Respondents.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT.

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**BRIEF FOR PETITIONER.**

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**OPINIONS BELOW.**

The opinion of the Court of Appeals is reported at 342 F. 2d 596; it is reprinted at pages 221-39 of the Transcript of Record (hereinafter designated as "R"). The findings

of fact and conclusions of law of the District Court, upon which the cause was dismissed, are reprinted at pages 145-58 of the Transcript of Record; these have not been reported.

### **JUDGMENT.**

The judgment of the Court of Appeals was entered on March 11, 1965 (R. 239-40). The petition for a writ of certiorari was filed on May 20, 1965 and granted on October 11, 1965. The jurisdiction of this Court rests upon 28 U. S. C. Sec. 1254 (1), 62 Stat. 928.

### **QUESTIONS PRESENTED.**

Petitioner filed a derivative suit in the United States District Court for the Northern District of Illinois, acting as a shareholder on behalf of Hilton Hotels Corporation. She alleged that officers and directors of the Corporation had engaged in numerous violations of the Federal Securities Acts and Delaware corporation law. Petitioner's suit was dismissed with prejudice on the ground that, because of her lack of knowledge and understanding of the basis of the suit, her verification under Rule 23(b) of the Federal Rules was false and a nullity. The Court of Appeals affirmed.

The questions presented are—

1. In the light of the policy of the Federal Securities Acts to protect the ignorant and the unknowledgeable, may a complaint charging serious violations of those laws be dismissed because the plaintiff-stockholder in a derivative suit is ignorant and unknowledgeable?

2. Is a verification on information and belief under Rule 23(b) false because the plaintiff is unable to testify concerning the basis or theory of the suit or the positions and activities of the individual defendants?

3. If the verification is false in the unusual sense that the Court of Appeals found it to be, is a motion to dismiss the suit sustainable where the record discloses that the suit is well-founded or at least that substantial triable issues remain to be decided, and where it contains an affidavit under oath by counsel attesting that the allegations are true?

4. If the verification is in any sense false, is dismissal of a derivative suit for failure to comply with the Rules, as specified in Rule 41(b), an appropriate or proper remedy?

#### **STATUTES INVOLVED.**

The statutes involved are Section 10(b) and Sections 9(a) and (e) of the Securities and Exchange Act of 1934 (15 U. S. C. 78j, 78i), and Sections 17(a) and 12(2) of the Securities Act of 1933 (15 U. S. C. 77q, 77l). These statutes are reprinted in Appendix A, pages 55-57 *infra*. The case also involves the construction of Rules 11, 23(b), and 41(b) of the Federal Rules of Civil Procedure, which are reprinted in Appendix B, pages 58-59 *infra*.

#### **STATEMENT OF THE CASE.**

This suit was filed by Dora Surowitz, a shareholder in Hilton Hotels Corporation, on behalf of herself and other shareholders, charging that the officers and directors of the Corporation had defrauded it of large sums of money, contrary to their fiduciary obligations and in violation of the Securities Act of 1933, the Securities Exchange Act of 1934, and the Delaware General Corporation Law (R. 1-88).

Prior to pleading, defendants took the deposition of Petitioner (R. 94-114). Relying upon that deposition, they moved to dismiss on two specific grounds: (1) that

the complaint was a sham pleading; and (2) that the Petitioner was not a proper party plaintiff (R. 117-18). The District Court, without hearing evidence but having before it the affidavits filed by the parties, granted defendants' motion and dismissed the cause on the ground that Petitioner's verification under Rule 23(b) was false and sham. The Court of Appeals affirmed.

### **The Complaint.**

The complaint consists of eleven counts. Six counts relate to an offer and purchase by the Hilton Hotels Corporation of 300,000 shares of its own common stock. The other five relate to an offer and purchase by the Hilton Hotels Corporation of 1,058,997 shares of Hilton Credit Corporation stock.

### **Allegations Relating to the Purchase of 300,000 Shares of Hotels Corporation Stock.**

The essential facts pleaded in Counts I-VI inclusive are as follows:

In December 1962 and January 1963, the individual defendants, as the officers and directors controlling the Hotels Corporation, caused the Corporation to mail certain documents to its shareholders throughout the country, whereby the Corporation, for a limited period of time and under certain conditions, offered to purchase 300,000 shares of its outstanding \$2.50 par value common stock at a price or prices, to be chosen by each stockholder, between \$28.125 and \$29.50 per share (R. 4-5). These documents were attached to the complaint as Exhibits A-D inclusive (R. 65-79).

The individual defendants stated in the offer of December 17, 1962 (Exhibit B, R. 67-71) the reason for making the proposal: "The purpose of Hilton in making this offer

is to repurchase the Common Stock of this Corporation equal to the number of shares heretofore issued in connection with the acquisition of certain properties, which properties are no longer owned by the corporation" (R. 5, 68). This explanation was false and misleading.

The individual defendants were in fact engaged in a deceptive plan to make it possible for Conrad N. Hilton, Henry Crown, and other officers and directors to dispose of their shares in the Corporation at prices more favorable than they could have obtained on the market (R. 6).<sup>1</sup> In so doing, they concealed from the Hotels Corporation and its stockholders the true purpose of the offer to purchase and made it appear that it was to the Corporation's advantage to effect the purchase, when in fact it was contrary to the interests of the Corporation (R. 6-7).<sup>2</sup>

Further, the individual defendants represented that the "current market price" of the Hotels Corporation common stock as of the date preceding the date of the offer was

1. Officers and directors who sold stock to the Corporation pursuant to the tender offer, and the number of shares they sold, are as follows (R. 11):

| Name                      | Number of Shares |
|---------------------------|------------------|
| Conrad N. Hilton .....    | 85,847           |
| Sam D. Young .....        | 353              |
| Vernon Herndon .....      | 1,147            |
| Herbert C. Blunck .....   | 393              |
| Charles L. Fletcher ..... | 4,100            |
| Robert A. Groves .....    | 6,000            |
| Joseph A. Harper .....    | 2,150            |

2. The effect of the purchase was to reduce working capital by approximately \$8,564,000 at a time when the Corporation's debts and commitments were increasing. For example, by the end of 1962, long-term debts had increased by more than \$50,000,000 over and above the amount of such obligations at the end of 1961, investments had increased by nearly the same amount, and guarantees had been issued on various transactions which exposed the Corporation to possible liabilities in excess of \$20,000,000. In addition, by the end of 1962, the Corporation's current assets had decreased by \$9,500,000, compared with year-end 1961, while current liabilities had increased by more than \$2,500,000 (R. 6-7).

\$28.125. This representation was misleading in that the defendants failed to disclose that they had engaged in activity designed to inflate the price of the stock, in order to achieve, temporarily, a price on the market at the lower end of the scale of prices they proposed to use for the purpose of their plan (R. 8). They did not disclose, moreover, that financial information available to them as officers and directors made it apparent that the earnings of the Hotels Corporation were declining and that the market price of its shares was therefore likely to fall (R. 9).<sup>3</sup>

The notice of January 7, 1963 stated that defendant Conrad N. Hilton, although entitled to offer more than ten percent of his stockholdings, would offer only ten percent, namely, 85,847 shares. In fact, the 85,847 shares sold by Mr. Hilton were in excess of ten percent of his holdings on January 7, 1963. The statement was further false and misleading in that it failed to disclose that Conrad N. Hilton had agreed to purchase over 101,000 shares from defendant Henry Crown and Crown's related family interests. Failure to disclose this arrangement helped to conceal the extent to which the plan and its implementation were intended to inure to the benefit of defendant Henry Crown and his family (R. 10).

As a result of their scheme, and its carrying out pursuant to false and misleading representations and actions, the individual defendants caused the Hotels Corporation to purchase 300,000 shares of its common stock at a total price in excess of \$8,500,000; at least 101,650 shares were purchased from the officers and directors of the Hotels Corporation (R. 11-12).

On the basis of these facts, Petitioner charged, in Counts

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3. Operating profits for 1962 were less than 80% of operating profits for the preceding year and were the lowest since 1954. Profits for the first quarter of 1963 were approximately 40% below profits for the same period in 1962.

I through IV, respectively, that the individual defendants were guilty of violating (1) Section 10(b) of the Securities Exchange Act of 1934 and the rules promulgated thereunder (R. 14-15); (2) Section 17(a) of the Securities Act of 1933 (R. 15-16); (3) Sections 9(a)(4) and 9(e) of the Securities Exchange Act of 1934 (R. 17-18; 21-23); and (4) Section 12(2) of the Securities Act of 1933 (R. 23-24; 30-31). Jurisdiction of these counts was conferred by Section 22 of the Securities Act of 1933 and Section 27 of the Securities Exchange Act of 1934. Count V charged certain of the defendants with violating the General Corporation Law of the State of Delaware (Title 8 of the Delaware Code) (R. 31-33). Finally, Count VI charged certain of the defendants with violating Section 244 of the General Corporation Law of the State of Delaware, by causing a reduction in the capital of the Hotels Corporation without adhering to many of the specific requirements of that section (R. 34-38).

#### **Allegations Relating to the Purchase of Shares of Credit Corporation Stock.**

The essential facts pleaded in Counts VII to XI inclusive are as follows:

At all relevant times, a majority of the Board of Directors of the Credit Corporation has consisted of officers and directors of the Hotels Corporation (R. 38-39). In January 1963, the individual defendants, as the officers and directors having control over both corporations, with the approval and assistance of the Credit Corporation, caused a "Letter of Transmittal" and an "Offer" to be mailed by the Hotels Corporation to the shareholders of the Credit Corporation, whereby the Hotels Corporation offered to purchase 1,390,706 shares of the Credit Corporation's outstanding common stock at a price of \$3.25 per share (R. 40-41). These documents are, respectively, Exhibits E



and F attached to the complaint (R. 79-88). The individual defendants caused the Hotels Corporation to state, in the Letter of Transmittal of January 15, 1963 (Exhibit E, R. 79-84), the reasons for the offer (R. 41-42):

As you know, Hilton Credit is obligated on notes to various banks in the aggregate amount of \$12,150,000, which mature under their respective terms on February 28, 1963. Under the terms of an Extension Agreement dated February 9, 1962 with said banks, Hilton Credit has the option to extend the maturities of said notes to February 28, 1964, provided, among other things, that the \$5,000,000 Subordinated Notes, due March 1, 1963, have been extended to a date not earlier than March 1, 1964. Hilton Hotels holds \$1,900,000 of said Subordinated Notes and has agreed to extend the maturity of the same until March 1, 1964 if all of the holders of said Subordinated Notes similarly agree. Although all of the holders of such Subordinated Notes have not agreed to extend their maturity as yet, it is anticipated that said holders will so agree to extend the maturity of the Subordinated Notes until March 1, 1964. Accordingly, it is anticipated that the maturities of the bank loans will be extended to February 28, 1964. There is no provision for the extension of the bank loans or the Subordinated Notes after February 28, 1964 and March 1, 1964, respectively. As a result, Hilton feels that it may be required to take a major role in any refinancing of such indebtedness.

Under the circumstances, the Board of Directors of Hilton has authorized the making of an offer to Hilton Credit Stockholders to purchase 80% of the outstanding shares of Common Stock of Hilton Credit, including the shares already owned by Hilton, for \$3.25 per share upon the terms and conditions set forth in the enclosed formal offer. Hilton has no intention of merging with Hilton Credit.

This explanation was false and misleading. These defendants were engaged in a deceptive plan to make it possible

for defendants Conrad N. Hilton, Henry Crown, Barron Hilton, and other officers and directors of the two corporations to dispose of shares in the Credit Corporation at a price more favorable than they could obtain on the market (R. 42-43). They therefore concealed from the Hotels Corporation and its stockholders the true purpose of the offer to purchase and made it appear that it was to the Hotels Corporation's advantage to purchase the Credit Corporation's shares, when in fact the purchase was contrary to the interests of the Hotels Corporation (R. 43).<sup>4</sup>

The individual defendants represented that on January 10, 1963 the market price of Credit Corporation stock was between \$3.125 and \$3.50 per share. This representation was misleading in that the defendants failed to disclose that they had engaged in activity designed artificially to inflate the price for the purposes of their scheme and plan (R. 44).

The proposal in the letter of January 15, 1963 (Exhibit E, R. 79-84) stated that the Hotels Corporation had been authorized to purchase 80 percent of the outstanding shares of Credit Corporation.<sup>5</sup> Nonetheless, the Hotels Corporation was caused by the individual defendants to purchase a lesser amount of shares which, together with previously owned shares, resulted in ownership of only 67 percent of the outstanding shares of Credit Corporation (R. 44-45).

The interests of defendants Conrad N. Hilton, Henry Crown and others, as creditors of the Credit Corporation, were concealed. When the stockholders of both companies were informed that Hotels Corporation was to be put into a

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4. The effect of the purchase was to reduce working capital of Hotels Corporation by approximately \$3,441,000 at a time when the Corporation's need for working capital was increasing, and to cause Hotels Corporation to take a larger role in underwriting Credit Corporation's debts, liabilities, and losses.

5. A similar objective was set forth in the "offer" of that date (Exhibit F, R. 85-88).

position of greater responsibility for the financial affairs and liabilities of the Credit Corporation, they were not told that this increased responsibility and financial backing would inure in good part to the personal advantage of those individual defendants who, as creditors, faced serious collection problems (R. 45).

As a result of their scheme and their false and misleading representations and deceptive actions, the individual defendants caused the Hotels Corporation to purchase a total of 1,058,997 shares of Credit Corporation stock at a total price of \$3,441,740.25; more than 60 percent (631,262) of these shares were sold by the officers and directors of the Hotels Corporation (R. 46).<sup>6</sup>

On these facts, Petitioner charged in Counts VII through X, respectively, that the individual defendants violated (1) Section 10(b) of the Securities Exchange Act of 1934 and the rules and regulations promulgated thereunder (R. 48); (2) Section 17(a) of the Securities Act of 1933 (R. 49-50); (3) Sections 9(a)(4) and 9(c) of the Securities Exchange Act of 1934 (R. 50-51; 54-55); and (4) Section 12(2) of the Securities Act of 1933 (R. 55-56; 60-61). In addition, certain of the defendants were charged in Count XI with

6. Officers and directors of the Hotels Corporation who sold Credit Corporation stock pursuant to the tender offer, and the number of shares which they sold, are as follows:

| Name   | Number of Shares Sold |
|--|-----------------------|
| Conrad N. Hilton (including a corporation controlled by him)....                           | 375,967               |
| Barron Hilton .....  | 126,392               |
| Henry Crown (including a corporation controlled by him) .....                              | 70,631                |
| Charles L. Fletcher .....  | 24,100                |
| Robert P. Williford .....  | 14,150                |
| Vernon Herndon .....   | 4,408                 |
| Robert J. Caverly .....  | 464                   |
| Conrad N. Hilton Foundation<br>(A charitable foundation controlled by Conrad N. Hilton)... | 28,334                |

violating the General Corporation Law of the State of Delaware (Title 8 of the Delaware Code) (R. 61-63).

### **The Verification.**

The complaint was signed by Petitioner's attorneys and verified by Petitioner (R. 63-64). The allegations verified as true and correct of Petitioner's own knowledge were limited in the main to matters relating to Petitioner's status as a shareholder; most of the allegations, particularly those allegations setting forth improper conduct, were verified on information and belief.

### **Matters Considered on the Motion Below in Addition to the Complaint: the Deposition and Affidavits.**

In addition to the pleadings (the complaint), the courts below considered, in passing on the motion to dismiss, (1) the deposition of the Petitioner (R. 94-116), (2) an affidavit by E. T. Cassin (R. 93) submitted by defendants, (3) an affidavit of Irving G. Brilliant (R. 120-134) submitted by the Petitioner, and (4) an affidavit of Walter J. Rockler (R. 135-143) submitted by the Petitioner.

The deposition of the Petitioner was taken on February 25, 1964, two and one-half months after the filing of the complaint and before any answer by the defendants. In response to questions from defendants' attorneys, Mrs. Surowitz stated that she has been the holder of 100 shares of Hotels Corporation common stock since about 1957, and that the stock was purchased for her with her money by her son-in-law and financial advisor, Irving Brilliant (R. 95-97). Upon receiving the documents relating to the tender offer, she turned them over to her son-in-law and inquired as to their meaning (R. 109-10). Shortly thereafter, Mr. Brilliant brought to Petitioner for her signature a letter addressed to the Hotels Corporation protesting the pro-

posed tender offers. After discussing the contents with Mr. Brilliant, Mrs. Surowitz signed the letter (R. 97-98, 110). During the summer of 1963, she complained to Mr. Brilliant about the action of the Hotels Corporation in passing its dividend. Mr. Brilliant said that "he would try to see what was wrong, that I don't get my dividends" (R. 111-12). Finally, on or about December 12, 1963, Mr. Brilliant brought Mrs. Surowitz the complaint. After he read and explained the document to her, she executed the verification (R. 95-96).

Mrs. Surowitz was questioned as to the facts upon which she based certain of the allegations which she had sworn were true and correct. In several instances she replied that she did not know anything about it and did not understand it (R. 102-04).

She was asked to state the facts and information upon which she based her belief as to the correctness of various allegations verified on information and belief. Her answers to these questions were: "I can't explain it to you, I don't know," or the like (R. 105-07). When asked whether she knew any facts at all upon which she based the allegations, Mrs. Surowitz stated, "I don't know. I can't give you no facts because I don't understand it" (R. 107). She further stated that, with respect to all of the allegations of the complaint which she verified on information and belief, "I have no information because my son-in-law, I left it to him, and he was the one that knew all about it" (R. 107). She also stated that she knew nothing about any of the individual defendants personally (R. 101), but that "all I know is that my stock wasn't right, and that's all" (R. 105).

It was evident that Mrs. Surowitz had difficulty understanding several questions. For example, she testified (R. 98):

Q. Can you tell us, Mrs. Surowitz, why you did not

tender your shares of stock pursuant to the offer which is attached to your complaint?

A. I don't know. Can you explain to me what you mean? I don't understand what you are talking about.

Q. Did you understand that there was a solicitation for tender of Hilton Hotels Corporation stock made by Hilton Hotels Corporation?

A. What does it mean, "tender"? I don't understand the word.

At another point, the following exchange took place (R. 100):

Q. Do you have any claims or causes of action against the defendants in this case other than those which were set forth in the complaint, Mrs. Surowitz?

A. What do you mean by that? Can you explain it to me?

Q. You don't understand that question?

A. I don't.

Defendants also filed the affidavit of Mr. E. T. Cassin, Trust Officer and Assistant Secretary of the First National Bank of Chicago, stating that the records of the Bank, as transfer agent for the Hotels Corporation, indicated that the petitioner had been a stockholder of record since October 10, 1963 (R. 93).<sup>7</sup>

The affidavit of Irving G. Brilliant, Petitioner's son-in-law, stated that he is a graduate of Harvard Law School and for the past ten years has acted as a professional investment counselor (R. 120). As of December 1962, members of his immediate family owned more than 2,350 shares of Hilton Hotels Corporation common stock (R. 121). Since 1957,

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7. This affidavit was evidently intended to support the ground of the motion to dismiss that Petitioner was not a proper party because she was not a stockholder at the times of the transactions attacked in the complaint. In view of the documentation (R. 125-134) demonstrating her stock ownership in 1957 and thereafter, this contention by the defendants was abandoned. See Opinion of the Court of Appeals, R. 226, footnote 9.

his mother-in-law, Mrs. Dora Surowitz, has been purchasing small amounts of stock in reliance upon his suggestions and advice, and on August 1, 1957 she purchased 100 shares of Hilton Hotels Corporation common stock (R. 121).

Mrs. Surowitz, a woman in her sixties, is an immigrant from Poland. She has had limited schooling and has difficulty understanding English, except in ordinary everyday matters. She has an extremely limited understanding of corporate or securities transactions. For these reasons Mrs. Surowitz has relied completely upon Mr. Brilliant in financial matters (R. 121-22).

In December 1962, Mrs. Surowitz brought him the papers relating to the tender offer of the Hotels Corporation and inquired as to the nature of the transaction. He informed her that he was studying the matter (R. 122). Shortly thereafter he contacted Walter J. Rockler, with whom he discussed the tender. They jointly reached the conclusion that the proposed transaction was questionable and should be objected to. Accordingly, Mr. Rockler prepared a letter of protest which was signed by Mrs. Surowitz after Mr. Brilliant explained its nature to her (R. 122). He personally conducted investigations into the transactions and communicated the results to Mr. Rockler (R. 123).

Upon the decline in market price of Hotels Corporation stock and the passing of its dividend during 1963, Mrs. Surowitz asked him for advice. He told her that Mr. Rockler was of the opinion that the officers and directors had engaged in wrongful acts and suggested that, to prevent further mismanagement, it might be wise to bring suit. After discussing the matter with Mr. Brilliant, Mrs. Surowitz stated that she was willing to sue (R. 123-24).

Upon receiving the complaint, he read and explained it to Mrs. Surowitz and informed her that the charges contained in it reflected his and Mr. Rockler's investigations

and that, in his opinion, the charges of wrongdoing were soundly based (R. 124).

Walter J. Rockler, in his affidavit, substantiated many of the statements contained in Mr. Brilliant's affidavit with respect to the background of the suit, and, in addition, described the nature and extent of the investigations, sources of facts, and studies made by him and his associates over a period of about one year prior to filing the complaint (R. 135-43). The affidavit specifically stated that "the allegations specified in the verifications to be true and correct were and are true and correct," and that he believes that "the complaint in this action [is] firmly grounded in fact and law . . ." and that a trial would "establish the merits of the plaintiff's position . . . and the substantial truth and soundness of the allegations of fact set forth in the complaint." (R. 142-43.)

#### **District Court's Order of Dismissal.**

After reviewing Mrs. Surowitz' deposition and the affidavits, and after hearing argument on March 23, 1964, the District Court on March 30th entered an order of dismissal supported by Findings of Fact and Conclusions of Law (R. 145-58) to the following effect:

1. The verification of Mrs. Surowitz was false (R. 156-57). Consequently it was a nullity and did not constitute the verification required by Rule 23(b) (R. 157). The failure of Mrs. Surowitz to supply information about the charges of the complaint "was not caused by the use of technical language in the questions or by her failure to understand what was being asked." (R. 153.)

2. The requirements of Rule 23(b) are in addition to those of Rule 11. Rule 23(b) provides protection against the filing of sham or frivolous complaints, and against the evil of attorneys or others maintaining shareholders' deriv-



ative suits by seeking out and inducing shareholders, without knowledge of alleged wrongdoing, to lend their names as plaintiffs. Accordingly, it is not sufficient compliance with Rule 23(b) to attach a false verification or the verification of a person who has no knowledge or understanding concerning even the general nature of the charges made in the complaint and who executes the verification in blind trust and faith on the assurance of some other person that there is a sound basis for the allegations (R. 157).

3. The purpose of the verification required under Rule 23(b) is to permit defendants to examine the plaintiff concerning the factual basis upon which allegations are made before the defendants are required to proceed with the costly and burdensome task of discovery in such complex cases. If the purpose of this requirement is to be accomplished, the plaintiff verifying the complaint must at least understand the nature of the charges in the complaint and have some knowledge concerning its factual basis (R. 157).

Finally, the District Court struck the complaint and dismissed the action for the reason, additionally, that counsel filed a false affidavit with respect to costs and expenses of the suit<sup>8</sup> (R. 158).

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8. This determination was reversed by the Court of Appeals, which held, "So far as the order of dismissal rests upon the determination that the attorneys violated Rule 39 of the court below, such a finding is wholly without evidentiary support and is clearly erroneous" (R. 228-29). Parenthetically, it should be noted that thus far in the suit two other grounds for dismissing the cause have also failed: (1) that the complaint is a sham in the usual sense of being devoid of substance; and (2) that the Petitioner was not a stockholder at the time of the transactions complained of. Cf. fn. 7, *supra*.

### **Decision of the Court of Appeals.**

The Court of Appeals affirmed the dismissal, declaring that "the court below correctly held that a pleading governed by Rule 23(b) is sham when it clearly appears that the ostensible verification is a mere formality without knowledgeable or informative comprehension in the party plaintiff whose verification gives it the breath of life" (R. 238). In reaching its admittedly novel and unprecedented conclusion (R. 233), the Court of Appeals apparently reasoned as follows:

1. If verification under Rule 23(b) is to be meaningful and is to furnish added assurance of the "legitimacy" of a complaint (R. 235-37), the plaintiff must have a knowledge of his relationship to the suit, the official identities of the parties charged, and a general understanding of the foundation of the complaint (R. 236). Petitioner, a woman of little education, wholly lacking in financial comprehension, did not have any grasp of the offenses charged and could not identify the individual defendants in their corporate roles as officers and directors. Her verification of the complaint was "without knowledgeable or informative comprehension" (R. 238). It was, therefore, "false" (R. 235). The verification, being "false" in this sense, made the complaint a sham (R. 238).

2. Neither counsel's certification by signing the complaint nor counsel's affidavit detailing the investigations conducted prior to filing the complaint and attesting to the truth of the complaint remedied the defect (R. 237-38). Counsel's affidavit was not an additional verification because it was filed in response to defendants' motion and not upon a separate motion to substitute a new verification or as an amendment to the complaint (R. 238).

3. The policy of the federal securities laws has nothing to do with the case (R. 229). That policy may be to protect

the gullible and ignorant but, since the case involves a derivative action, the complaint must be verified. Since petitioner is too ignorant to verify properly, she is barred by Rule 23(b) from complaining of these securities acts violations.

4. The complaint is a sham even though many of the allegations are "obviously true and cannot be refuted" (R. 236). Indeed, although not a single allegation is shown to be false in any way, the complaint is a sham. The suit was properly dismissed with prejudice under Federal Rule 41(b) (R. 238).

5. In essence, therefore, the Court of Appeals held that by reason of Petitioner's limited understanding and knowledge—defects inherent in her limited education, limited command of English, and limited knowledge of corporate and financial matters—"there was, in fact, no verification of this complaint" (R. 236).

**SUMMARY OF ARGUMENT.****I.**

The true purpose of Rule 23 (b) of the Federal Rules of Civil Procedure is to prevent corporate managers from collusively obtaining federal jurisdiction. This objective is made clear in *Hawes v. Oakland*, 104 U. S. 450 (1882), where the Rule had its origin. Verification under the Rule is primarily intended to furnish maximum warranties in these jurisdictional areas. It was not the purpose of this Court, in formulating the Rule, to hamper or restrict legitimate stockholder suits bringing corporate causes of action in the federal courts. Rather, the Rule was directed at corporate officers and directors who sought to make use of compliant stockholders for the purpose of securing federal jurisdiction in instances where otherwise it could not be obtained. Verification was never intended to set the stage for a preliminary pre-trial testing of the stockholder-plaintiff's fitness or mental capacity.

Rule 23 (b) should be interpreted liberally in light of its origin and purposes. It should not be employed, as it was here, to bar a stockholder from seeking to enforce corporate causes of action under the Securities Acts simply because of her limited understanding. This result is particularly indefensible in a situation in which, realistically, the stockholder is simply the vehicle for bringing the corporate causes of action to court. In such cases, the stockholder-plaintiff is required only to have sufficient interest to enable him to institute the action, since the corporation is the real party in interest.

Petitioner truthfully verified the facts upon which her standing to sue rests, namely, her residence in New York, her ownership of Hilton Hotels Corporation stock since 1957, and her sending a letter of protest to the Corporation